Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-721

FRANK R. WEST,
Petitioner,

VERSUS

THE STATE OF IOWA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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July, 1977

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

Petitioner, Frank R. West, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Iowa entered in this case on April 20, 1977. Rehearing was denied on May 19, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Iowa is reported at 252 N.W.2d 454 and appears as Appendix A to this petition. The Supreme Court of Iowa reversed and remanded an order entered by the District Court of Story County setting aside indictments charging the Petitioner, and another individual with the crime of false pretenses under § 713.1 Iowa Code (1975) and with the crime of conspiracy to commit false pretenses under § 719.1 Iowa Code (1975). The Order denying rehearing appears as Appendix B to this petition. The Order of the District Court of Story County appears as Appendix C to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). This petition for writ of certiorari is filed within ninety (90) days of the order of the Supreme Court of the State of Iowa denying the petitioner's petition for rehearing (May 19, 1977).

QUESTION PRESENTED

Whether a state's judicial expansion of a criminal statute with unforeseeable and retroactive application adverse to an accused individual is prohibited by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Iowa false pretenses statute, § 713.1 Iowa Code (1975); the Iowa conspiracy statute, § 719.1 Iowa Code (1975); and the Fourteenth Amendment to the United States Constitution appear as Appendix D to this petition.

STATEMENT OF THE CASE

From an order of the District Court of Story County setting aside the indictments against the petitioner, the State of Iowa perfected an appeal to the Iowa Supreme Court. The District Court held that the State of Iowa in the indictments and bill of particulars filed by the State failed to allege facts constituting the elements of the crimes of false pretenses and conspiracy to commit false pretenses with which the petitioner was charged.

On April 20, 1977, the Iowa Supreme Court reversed the District Court's decision and remanded the case for trial. The Iowa Supreme Court in its opinion acknowledged the correctness of the District Court's opinion as to what constituted the elements of the crimes of false pretenses and conspiracy to commit the same under prior judicial construction. The Iowa Supreme Court, however, rejected its own prior construction of the false pretenses statute and what elements made up the crime and expanded the statute to include acts previously not a crime, directing the new construction of false pretenses be applied to the two-year-old acts of petitioner in its remand of the case for trial. The Iowa opinion states in part:

> "The trial court correctly points out that a purchase in the normal course of business with no intent to pay has never been the basis for prosecution for false pretenses in this jurisdiction." (page 5).
>
> "He [the trial court] very properly observed, 'Up to this point in time, a false promise generated from a transactional contract between offender and victim, without more, has not been treated as a criminal false pretense in this State. This is also the approach taken in a majority of the jurisdiction. * * * Insofar as the trial judge is concerned it is his duty to follow and apply the existing law, * * * '" (page 6).
>
> "We have concluded we must reexamine our position that a mere promise to pay, with no intent to do so, is not a misrepresentation which will sustain the charge of false pretenses under § 713.1, The Code." (page 7).
>
> "We therefore hereby reject any previous position taken by this court that a promise to perform a future act, made with the intent not to perform is not sufficient to support a charge of cheating by false pretenses." (page 9).

The opinion clearly states that prior judicial construction of the false pretenses statute is rejected and the statute shall now be more broadly construed to include alleged acts committed by the petitioner which, when committed, were not considered a crime under the existing construction of the statute.

Petitioner, in his petition for rehearing, asked the Iowa Supreme Court to reconsider the issue of the remand only, and not the Court's decision to reject its prior positions and change the construction of a criminal statute. Petitioner advocated the position that the remand had the effect of a retroactive application of a new statutory construction which is prohibited by the Fourteenth Amendment to the United States Constitution. The Iowa Supreme Court denied the petition for rehearing and on this issue the petitioner now seeks a writ of certiorari.

REASONS FOR THE ALLOWANCE OF THE WRIT

In this Court, the petitioner presents only a single issue which he believes to be of great importance since a state court has decided a question of substance regarding rights protected by the Federal Constitution and contrary to prior decisions of this Court.

The issue in essence is whether the Iowa Supreme Court can judicially expand a state criminal statute with unforeseeable and retroactive application adverse to an accused individual and contrary to decisions of this Court directing such actions to be incompatible with the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This Court has recognized that a criminal statute must give fair warning of the conduct that it makes a crime. In *Bouie* v. *City of Columbia*, 378 U.S. 347, 351, 84 S.Ct. 1697, 1701, 12 L.Ed.2d 894 (1964), this Court cited this general principle and went on to apply this concept to the action then at bar:

> "As was said in *United States* v. *Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,
>
> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'
>
> "Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L.Ed. 322. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violated the first essential of due process of law,' ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta* v. *New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 619, 83 L.Ed. 888."

These principles have critical application to the Petition now before the Court since the Iowa Supreme Court through its reinterpretation of the essential elements of

what constitutes the crime of false pretenses in Iowa under § 713.1 Iowa Code (1975) has changed a statute which was subject to one judicial construction for nearly 100 years, to something which could not have been anticipated as being proscribed until after the new elements were judicially written into the law. Judicial expansion of existing laws deprives an accused of his right of fair warning by an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. *Bouie* v. *City of Columbia*, supra, 84 S.Ct. at 1702. *Douglas* v. *Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973). Due process requires that the law give sufficient warning that men may conform their conduct to avoid that which is forbidden. *Rose* v. *Locke*, 423 U.S. 3, 96 S.Ct. 243, 46 L.Ed.2d 3 (1975).

Mr. Justice Brennan, in the *Bouie* decision, stated:

"As the Court recognized in *Pierce* v. *United States*, 314 U.S. 306, 311, 62 S. Ct. 237, 239, judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. * * * Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed,' *Calder* v. *Bull*, 3 Dall. 386, 390, 1 L.Ed. 648. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith* v. *Calhoon*, 283

U.S. 553, 565, 41 S. Ct. 582, 586, 75 L.Ed. 1264. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61." 84 S.Ct. at 1702.

The holding in *Bouie* that an unforeseeable state court construction of a criminal statute applied retroactively, subjecting a person to criminal liability for past conduct deprives him of due process of law by not giving him fair warning that his contemplated conduct constitutes a crime is applicable to the action at bar.

Petitioner contends that the Iowa Supreme Court by remanding the case for trial after changing the elements of the crime of false pretenses, which it states quite clearly is its purpose, has given retroactive effect to a criminal statute which is prohibited by this Court's application of the due process clause of the Fourteenth Amendment to the Constitution.

CONCLUSION

For the reasons stated petitioner respectfully prays that a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Iowa.

Respectfully submitted,

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July, 1977

APPENDICES

APPENDIX A

FILED
APR 20 1977
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellant,	)	Filed April 20, 1977
vs.	)	84
	)	59959
FRANK R. WEST and ROBERT E. LEE, Appellees.	)	

Appeal from Story District Court, George G. Fagg, Judge.

Appeal by State of Iowa from order setting aside indictments charging defendants with crimes of conspiracy and of obtaining cattle by means of false pretenses.

—REVERSED AND REMANDED.

Richard C. Turner, Attorney General, John D. Hudson, Roxanne Barton Conlin, and Gary H. Swanson, Assistant Attorneys General, for appellant.

Linn, Helms, Kirk & Burkett of Oklahoma City, Oklahoma, and Nelson, Vasey & Cahill of Nevada, for appellee West.

Lathrop & Albracht of Omaha, Nebraska, for appellee Lee.

En banc.

REES, J.

In this case the State appeals the order of the trial court dismissing indictments against the defendants West and Lee who were respectively president-chairman of the board

and group vice-president in charge of procurement of American Beef Packers (hereinafter ABP). The defendants were indicted by the grand jury of Pottawattamie County and charged with conspiracy in violation of § 719.1 and false pretenses in violation of § 713.1, The Code, 1975. The venue was subsequently changed to Story County. It is the State's contention the trial court erred in holding that the indictments and the bill of particulars filed pursuant to court order failed to allege facts constituting the elements of the crimes of false pretenses and conspiracy to commit false pretenses. We reverse and remand for further proceedings.

As stated above, the defendants were officers of American Beef Packers, Inc., which was engaged in the business of purchasing cattle for slaughter customarily but not exclusively on a"grade and yield" basis. Under the "grade and yield" basis the company acquired the cattle without paying the owners until the cattle had been slaughtered and the carcasses checked by employees of the United States Department of Agriculture, payment then being made based on the "grade and yield" of the carcasses. The indictments and bills of particulars can be reasonably interpreted to allege that during the time period December 24, 1974 through January 6, 1975, the company had become hopelessly insolvent, which resulted in the filing of a voluntary petition in bankruptcy on January 7, 1975. During this period of financial distress, the company continued the operation, ordering cattle for slaughter, which were purchased and delivered during all of said period and until January 6, 1975. A bank account maintained in a Seattle, Washington bank was customarily used to make payment for cattle purchases, but the State charges that during this time there were no funds in this account, and that the bank had been instructed to return the checks drawn on it and transfer any remaining funds to another bank. The State further charges the defendants used the funds left in the several accounts of American Beef Packers, Inc., to pay off a few selected creditors, and that any income generated from the

cattle purchased during the period from December 24, 1974 through January 6, 1975 was channeled to such selected creditors, and the farmers who delivered cattle to ABP received no payment therefor during said period.

Following the filing of the petition for bankruptcy, the defendants West and Lee were indicted and charged with obtaining property under false pretenses and with conspiring to obtain property by false pretenses. Thirty separate indictments were filed, in which it was charged said crimes were committed upon 30 separate victims.

The indictments were subsequently amplified by the filing of a bill of particulars which was filed in response to the application of the defendants and the order of the court directing its filing. The indictment, the bill of particulars and a subsequent amendment to the bill of particulars disclosed the State's theory of the crimes charged; essentially that the defendants had obtained cattle from the sellers by representing either expressly or impliedly that ABP was in financial condition to pay for the cattle and that the company intended to pay for the cattle, when in fact the defendants knew that the company was unable to pay therefor and did not intend to make payment for any cattle secured.

The defendants moved to set aside the indictments, contending that the facts alleged in them and in the bill of particulars as amended did not constitute the crime of obtaining money by false pretenses or the crime of conspiring to obtain money by false pretenses. The court sustained the motion and the indictments were set aside. The trial court held, in its order of dismissal, that one of the elements of the crime of false pretenses was a false representation regarding a material existing fact or a past event, and held that a promise to perform an act in the future, coupled with a present intent not to fulfill the promise, is not a misrepresentation of an existing fact or past event. The trial court further held that the mere nondisclosure of facts known to

a defendant does not constitute a false representation of fact, and therefore does not meet the requirements for conviction of the crime of obtaining property by false pretenses.

The State contends the facts alleged in the indictment and bill of particulars as amended demonstrate ABP and defendants were operating behind a facade of "business as usual", misrepresenting to the cattle owners their intention and ability to pay for the cattle purchased. The State argues that by contracting to purchase the cattle, ABP implied and pretended (falsely) that payment would be made for the cattle in the regular course of business. It further alleges ABP had no intention to pay when it purchased the cattle and deceived the cattle feeders by pretending to be acting in the ordinary course of business.

The trial court found that the facts alleged in the bill of particulars as amended amounted to no more than a promise to pay in the future, joined with a present intent not to pay for the cattle and the silence of the defendants regarding a material fact, namely, the distressed financial condition of the company. Trial court concluded that this factual recitation did not sufficiently allege the element of misrepresentation of an existing fact or past event, and dismissed the indictments on the ground that they, even as amplified by the bill of particulars as amended, did not sufficiently allege the necessary element of the crimes charged therein.

From the foregoing rulings by the trial court the State appeals, stating as the sole issue justifying a reversal, its contention that the trial court erred in setting aside the indictments charging defendants with the crime of false pretenses under § 713.1, The Code, 1975 and with the crime of conspiracy to commit false pretenses under § 719.1, The Code, 1975. The State contends the transactions set out in the indictments and the bill of particulars were cash transactions and not credit transactions; that a false promise to pay, coupled with a misrepresentation as to a material past

or existing fact, is a false pretense; that the concealment or suppression of the truth can be a false pretense; that a failure to disclose financial condition is a ground for civil fraud or deceit, and that a promise made when the promisor has no present intent to perform, is a false pretense.

We conclude this appeal in reality presents two issues for determination:

1. Does a promise to perform an act in the future, made with no intent to perform, constitute a misrepresentation under the false pretenses statute, § 713.1, The Code?

2. Does the acquisition of property by a buyer pursuant to contract amount to a representation of intent to pay therefor?

I. The trial court bottomed its finding in dismissing the indictments against the defendants on the rationale that the misrepresentation must be of a past or existing material fact, and not of a promise to act in the future. Thus, the trial court reasoned, ABP though accepting cattle for slaughter with no intention to pay merely promised to pay for the cattle and could not be held guilty of misrepresenting an existing fact. The trial court correctly points out that a purchase in the normal course of business with no intent to pay has never been the basis for prosecution for false pretenses in this jurisdiction. In his order dismissing the indictments, the trial court invites this court to review the Iowa precedent on point in order to "ascertain if and when the precedent has outlived its usefulness." He very properly observed, "Up to this point in time, a false promise generated from a transactional contract between offender and victim, without more, has not been treated as a criminal false pretense in this State. This is also the approach taken in a majority of the jurisdictions. For a contrast of views, see the majority and dissenting opinions in Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946). Insofar as the

trial judge is concerned it is his duty to follow and apply the existing law, * * * "

The Iowa cases addressing this issue are all marked by two characteristics which minimize their value as legal precedent, namely, (1) that the cases failed to base the results on the issue discussed here, and (2) that the cases, all of early vintage, fail to recognize the tenor of present day commercial enterprise. None of the cases hold a charge or conviction of false pretenses invalid because of a failure to allege or prove a misrepresentation of past or existing fact, although the premise appears in the text of the opinions. The median year of the cases cited by the parties is 1900, although many of the cases do not address the issue, but merely list the elements of the offense as including a "misrepresentation of past or existing fact."

The cases which do address the issue directly all involve a finding of a misrepresentation of past or existing fact and accordingly sustain the charges against the defendants. In State v. Hollingsworth, 132 Iowa 471, 109 N.W. 1003 (1906), the indictment was found sufficient to charge an offense when it contained an allegation that defendant obtained a loan of money by falsely stating (1) he had arranged to go into business (2) he intended to go into business and (3) he intended to marry. The present fact falsely represented was that he had arrangements to go into business.

In State v. Fooks, 65 Iowa 196, 21 N.W. 561 (1884), it was held that defendant's statements that his brother was an English nobleman due to arrive shortly with money to repay the loan sought amounted to a representation that defendant had the ability to repay the loan. The present fact misrepresented was his ability to repay the loan, and his conviction was sustained.

In State v. Montgomery, 56 Iowa 195, 9 N.W. 120 (1881) a conviction was upheld where defendant obtained money on the pretense that he had goods to ship by freight,

and since he had no such goods that pretense was held to be a representation of present fact.

The case of State v. Dowe, 27 Iowa 273 (1869) directly addresses the issue of a false promise as a misrepresentation. In *Dowe* the court held that defendant, who pretended he had arrived to pay his debt induced the victim to sign a receipt for payment. The court found the act of falsely indicating his intention to pay was a false pretense, and reversed the order of the trial court setting aside the indictment.

We have concluded we must reexamine our position that a mere promise to pay, with no intent to do so, is not a misrepresentation which will sustain the charge of false pretenses under § 713.1, The Code. The false pretenses statute was adopted to prohibit the fraudulent taking of property. State v. Sabins, 256 Iowa 295, 127 N.W.2d 107 (1964). The false pretenses statute provides a criminal sanction against one type of fraud, the obtaining of title and possession of property by deceit. A civil remedy for fraud was in existence long before the adoption of the criminal statute, and provided another potential action which could be based on the same factual situation. The civil action for fraud which could arise from the facts in this case and the false pretenses charges made against the defendants differ mainly in the quantum of proof necessary to prove the charge in the criminal case. The elements of actionability in a civil or criminal case bottomed upon the same set of facts before us here would be virtually identical. See Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975). Therefore, we feel constrained to look to the development of the law in the parallel area of civil fraud in examining our statute on false pretenses, § 713.1, The Code.

The rule in Iowa in civil cases as articulated in Grefe v. Ross, *supra*, permits a finding of actionable fraud where a promise to perform a future act is made with the present intent not to perform. This area of the civil law has

developed from the rationale that the present intent of the promissor is a fact about which a false representation may be made. In this connection we note the frequently cited statement by Lord Bowen: "the state of a man's mind is as much a fact as the state of his digestion." Edgington v. Fitzmaurice, L.R. 29 Ch. Div. 459, 483 (1885). This court touched upon the foregoing premise by way of dicta in State v. Huckins, 212 Iowa 283, 234 N.W. 554, 559 (1931) when we said:

> "One's intention or knowledge is a fact as to which he may make a false pretense and thereby (the other elements being present) perpetrate the crime of cheating by false pretenses."

The issue as to whether false pretenses may be predicated on a false promise was the subject of a discussion in Chaplin v. United States, 157 F.2d 697 (D.C. Cir. 1946), 168 A.L.R. 828. A well-written dissent in *Chaplin* makes a persuasive argument in favor of permitting a false pretenses conviction based on a false promise. The federal cases which succeed *Chaplin* decline to follow its reasoning. In a prosecution for mail fraud, the court noted:

> "Indeed it has been the law ever since 1896 that to promise what one does not mean to perform, or to declare an opinion as to future events which one does not hold, is a fraud."

United States v. Grayson, 166 F.2d 863 (2nd Cir. 1948), referring to Durland v. United States, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896). See also United States v. Rubenstein, 166 F.2d 249 (2nd Cir. 1948), cert. den. 333 U.S. 868, 68 S.Ct. 791, L.Ed. (1948); United States v. Johnson, 284 F.Supp. 273 (W.D. Missouri 1968).

We are persuaded by the reasoning which has led courts to find fraud based on false promises, and note the meticulous tendency of this court in criminal cases in finding statements of present fact out of false promises. In State v. Foxton, 116 Iowa 81, 147 N.W. 347 (1914), this court found that the presentation of a personal check implied that defendant had the ability to pay, sustaining a false pretenses charge. We are unable to perceive difference between a finding that the false pretenses may be premised on a false promise and a finding that defendant misrepresented an ability to pay. When a defendant, knowing he is insolvent, promises to pay, he falsely represents his intention to pay. "(I)t is safer for purposes of the criminal law to construe a promise only as an assertion of *ability* to perform, because ability is 'factual' rather than mental. There is little practical difference between these conceptions." A. Pearce, Theft by False Promises, 101 U. Pa. L. Rev. 967, 1008 (1953).

We are constrained to find and now conclude that defendants were properly charged with the crime of false pretenses under the circumstances here; that is to say, where they represented an intention to pay for cattle received by them when they had neither the intention nor the ability to pay therefor. A jury should determine if such representation or promise to pay was made with no intention to perform. We therefore hereby reject any previous position taken by this court that a promise to perform a future act, made with the intent not to perform is not sufficient to support a charge of cheating by false pretenses.

II. The defendants argue that the crime of false pretenses must be committed by the making of some positive representation and that silence or concealment is insufficient to justify the charge. We do not agree.

The crime of cheating by false pretenses is predicated upon misrepresentation. The misrepresentation may be by words or action. The failure to disclose a material fact may well be a misrepresentation. In State v. Foxton, *supra*, this court found that the presentation of a check with no expectation that it would be covered is sufficient to support a conviction for false pretenses, even though no representa-

tion is made other than that involved in the delivery of the check. We find that no express false representation need be made. In this case the defendants solicited orders for cattle, entered into a contract for the purchase of the same at a stated price and accepted delivery of them. Such action implied the intent to pay for the cattle, and defendants deceived the owners of the same by pretending to be acting in the usual course of business, when in truth the allegations made by the State in the indictments, if proven, would justify a jury in concluding the defendants had no intention to pay for the cattle.

We must therefore conclude and find that the facts alleged by the State in the indictments and the bill of particulars as amended, if proven, constitute the crimes charged. The guilt or innocence of the defendants should be determined by a jury. We therefore reinstate the indictments and reverse and remand for further proceedings.

REVERSED AND REMANDED.

All Justices concur except McCormick, J., who concurs specially and Harris, J., who takes no part.

McCORMICK, J. (concurring specially).

I concur in Division II and the result.

We have long held that a false representation of fact may occur through conduct which misrepresents ability to pay for purchased goods. State v. Foxton, 166 Iowa 181, 147 N.W.2d 347 (1914). Here the State's particulars charge the defendants with purchasing cattle under a "business as usual" facade while secretly diverting funds to preferred creditors, planning bankruptcy and concealing ABP's insolvency. Although the trial court did not think so, I believe these circumstances show a false representation by implication.

This case comes well within the principle that a false promise may be coupled with a false representation of fact to constitute a false pretense. Pioneer Valley Savings Bank v. Indemnity Insurance Co., 225 F.Supp. 404 (N.D. Iowa 1964); State v. Dowe, 27 Iowa 273 (1869); State v. Montgomery, 56 Iowa 195, 9 N.W. 120 (1881); State v. Fooks, 65 Iowa 196, 21 N.W. 561 (1884); State v. Tripp, 113 Iowa 698, 84 N.W. 546 (1900); State v. Hollingsworth, 132 Iowa 471, 109 N.W. 1003 (1906); State v. Comes, 245 Iowa 485, 62 N.W.2d 753 (1954).

APPENDIX B

FILED
MAY 19 1977
CLERK SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellant,	)	
	)	No. 59101
vs.	)	
	)	ORDER
FRANK R. WEST and ROBERT E. LEE, Appellees.	)	

Defendant-appellees' petition for rehearing has been considered by the entire membership of the court in the above entitled matter and it is now refused and denied.

Done this 19th day of May, 1977.

/s/ C. Edwin Moore
Chief Justice—Iowa Supreme Court

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APPENDIX C

FILED
DIST. COURT
STORY CO., IOWA
1976 OCT 14 AM 8 12
MILLICENT FAGERBURGH,
CLERK

IOWA DISTRICT COURT,
STORY COUNTY

STATE OF IOWA,	)	
Plaintiff,	)	Pottawattamie Co.
	)	Nos. 2002C-2031C
vs.	)	
	)	Story Co.
FRANK R. WEST and	)	Nos. 4904-4933.
ROBERT E. LEE,	)	
Defendants.	)	ORDER

A recital of prior proceedings is essential to put this matter in proper focus.

1. On May 21, 1976, this Court granted the defendants' request for a bill of particulars in certain respects, namely, the State was required to describe the false representations forming the basis for the conspiracy and false pretense charges against them (see paragraphs 1 and 4 of the order).

2. On September 13, 1976, the State filed the bill of particulars with its responses corresponding to the numbered paragraphs contained in the court order. In paragraph 1 thereof, the false representations were described in detail, such description being incorporated into paragraph 4 by reference.

3. On October 8, 1976, this Court gave indication of a willingness to test on its own motion the sufficiency of the particulars stated in paragraph 1 of the bill, pursuant to Section 773.7, The Code, insofar as Story County Cause

No. 4926 was concerned, as the conspiracy count contained therein was assigned for jury trial on October 12, 1976.

4. On October 12, 1976, defendants filed a motion to set aside all of the indictments, including the conspiracy count (Story County No. 4926) and the false pretense counts (Story County Nos. 4904-4933). The motion was denominated as one seeking dismissal, but counsel agree to treat it as a motion under Section 773.7. Defendants contend the bill of particulars shows on its face that they did not commit, or conspire to commit, the crime of false pretenses.

5. On October 12, 1976, the State filed a substituted paragraph 1 of the bill of particulars, it being a complete substitute for its predecessor. Hence it stands by way of compliance with paragraphs 1 and 4 of the court order of May 21. Counsel agree that the substituted paragraph be considered in connection with defendants' motion to set aside the indictments.

The issue to be resolved can be couched in the form of a question. Do the particulars stated in the bill of particulars, as recently filed herein by the State, constitute the charged offenses? If the question is answered in the negative, the indictments must be set aside. For the purpose of resolving this issue, the Court's sphere of reference is limited to the indictments and particulars furnished in the bill, and specifically, substitute paragraph 1 is the focus thereof. State vs. Hall, 235 NW 2d 702, 720-721. United States vs. Neff, 212 F. 2d 297, 309 (3rd Cir. 1954).

The defendants are charged with conspiracy to obtain cattle by means of false pretense (Story County No. 4926), and they are also charged with the crime of false pretense itself (Story County Nos. 4904-4933). The law relating to these crimes is relatively well settled in Iowa. In the first place, a conspiracy in and of itself is not criminal, that is, it must have illegal activity or the attainment of a legal objective by illegal means as its goal. State vs. Blyth, 226

NW 2d 250, 263. 16 Am. Jur. 2d, Conspiracy, Section 1. 15A C. J. S., Conspiracy, Section 42, Page 742. Secondly, the crime of false pretenses requires a false pretense as an element thereof. State vs. Warren, 212 NW 2d 509, 513.

The words "false pretense" have a special and restricted meaning in the criminal law, when compared to civil proceedings. For criminal purposes, the pretense must not only be false, but also a representation as to a material existing fact or past event. State vs. Comes, 245 Ia. 485, 488; 62 NW 2d 753. In Iowa, a promise to perform an act in the future, although coupled with a present intent not to perform the promise, is not a false representation of past event or existing fact. Indemnity Insurance Company vs. Pioneer Valley Savings Bank, 343 F. 2d 634, 650-651 (8th Cir. 1965) (citing Iowa criminal cases in support of rule). Also State vs. Dowe, 27 Ia. 273, 275. Hence, the fraud of obtaining property by buying it with no intention to pay for it is not the crime of obtaining property by a false pretense. 32 Am. Jur. 2d, False Pretenses, Section 14. However, when a false promise is coupled with a false statement of existing fact or past event, the two are taken together as a false pretense. State vs. Hollingsworth, 132 Ia. 471, 473; 109 NW 1003. State vs. Montgomery, 56 Ia. 195, 198-199; 9 NW 120. Randle vs. U. S., 113 F. 2d 945, 949 (D. C. Cir. 1940).

Unlike the criminal law, for civil purposes a promise to perform a future act is an actionable representation when it is made with an existing real intention not to perform. Grefe vs. Ross, 231 NW 2d 863, 867. Significantly, even though the threshold of actionability is lower for civil purposes, the mere failure of a buyer to disclose his real financial condition is not a fraud upon the seller. Reid, Murdock and Fisher vs. Cowduroy, 79 Ia. 169, 172-173; 44 NW 351. Houghtaling vs. Hills, 59 Ia. 287, 289; 13 NW 305. Reid and Houghtaling merely echo the prevailing rule that a purchaser, when buying on credit, is not bound to disclose his financial condition to the seller, and mere silence as to his

pecuniary condition does not constitute fraud, even if his ability to pay is doubtful, his financial condition desperate, or he is insolvent. The rule is the same as to nondisclosure or silence concerning the financial status, credit or insolvency of a third person. 37 Am. Jur. 2d, Fraud and Deceit, Sections 171 and 172.

There is a related principle that should be mentioned, to-wit; a false pretense may be made by implication as well as by verbal declaration. 32 Am. Jur. 2d, False Pretenses, Section 17. However, in the cases enunciating this rule, a false circumstance has been affirmatively created by the offender, there invariably being open resort to artifice or deceitful means. By way of example, see the following cases: Bright vs. Sheriff, Wahoe County (Nev. 1974), 521 P. 2d 371 (a fictitious company was established using printed invoices and delivery slips signed by a nonexistent person). State vs. Farrah (Conn. 1971), 282 A. 2d 879 (deceptively worded notes delivered to victim suggested real estate was pledged as security when in fact the offender and his company could not provide valid mortgages). State vs. Huckins, 212 Ia. 283; 234 NW 554 (the defendant made express statements of fact based upon personal knowledge that were false). State vs. Foxton, 166 Ia. 181; 147 NW 347 (the defendant gave the victim a check drawn on a bank in which no funds were deposited).

Importantly, in Rogers vs. People (Colo. 1966), 422 P. 2d 377, wherein the accused failed to disclose his company's financial condition to the victim, although it was within his realm of knowledge, it was held that while "failure to make a disclosure and intentionally remaining silent as to a material fact may form the basis for a civil action in fraud or deceit, such evidence cannot support a conviction of obtaining money by false pretenses." In the opinion, at Page 380, the Court quoted from an earlier decision as follows:

> "The Attorney General does not claim that any false verbal statement was made by defendant at the time

> of the sale, but seeks to bring the case as made within the false pretense statute, upon the theory that the silence of defendant (he exchanged a cow for money without disclosing the existence of a chattel mortgage) is of itself a false pretense and misrepresentation. *The general rule is that the mere nondisclosure of facts known to defendant, even though a disclosure thereof would operate to deter the prosecuting witness from parting with his money, is not a false pretense.* (italics in opinion) And this is true, even though a false pretense may be proved by acts or conduct of the defendant as well as by his words. In People vs. Baker, 96 N. Y. 340, Earl, J., in delivering the opinion of the Court, expressly held that mere silence and mere suppression of truth, upon which another may act, is not sufficient to constitute the crime of false pretenses."

In *Rogers*, the Court noted that defendant made no statements to the victim concerning his company's financial condition, and that the victim relied upon defendant's integrity rather than inquiring about solvency, and concluded by saying, "All of this was what was in the mind of (the victim), and, of course, cannot form the basis of a criminal charge." The judicial guidance furnished in *Rogers* is exceedingly pertinent to the nature of the business contact and the motivity of the cattle producers in the situation at hand.

Turning now to the bill of particulars, and specifically, substitute paragraph 1. Taken in its most favorable light, the bill of particulars, with explanatory statements furnished during the course of hearing by counsel for the State, stands for the following:

1. Defendants, through agents and co-conspirators, purchased cattle for American Beef Pack [*sic*] from certain cattle producers upon quoted prices that would be paid therefor.

2. Payment was not made at the time the cattle were obtained from the sellers, nor were drafts or checks issued in exchange therefor. (In brief and argument, the State focused on In the Matter of Samuels and Company, 526 F. 2d 1238 (5th Cir. 1976), it featuring a priority dispute under the Uniform Commercial Code. Even if the cattle producers herein were treated as cash sellers like the victims in *Samuels*, it still remains the fact that the cattle producers transferred title and possession of their cattle to the company in exchange for a mere promise to pay. The federal regulations alluded to by the State simply shorten the period within which payment becomes due, but does not dispel the open credit aspect of the transaction.)

3. When the cattle were obtained, defendants knew the company was unable to pay for them at that time. No representations were made with respect to the availability of company funds for payment.

4. The financial distress of the company was not disclosed to the sellers, nor was any inquiry made by the sellers concerning its solvency.

Substitute paragraph 1 of the bill of particulars invites the following conclusions: The purchase and obtaining of the cattle without payment or issuance of indicia thereof invoked a promise to pay in the future, and the defendants' concurrent silence concerning the company's financial condition and resultant realization that payment could not then be made to the sellers is, at best, another way of saying the promise of payment was false, and this may be too strongly stated under presented particulars. There is no demonstrable false statement of existing fact or past event, and this is a prerequisite to the existence of a false pretense.

Up to this point in time, a false promise generated from a transactional contact between offender and victim, without more, has not been treated as a criminal false pretense in this state. This is also the approach taken in a majority

of the jurisdictions. For a contrast of views, see the majority and dissenting opinions in Chaplin vs. U. S,, 157 F. 2d 697 (D. C. Cir. 1946). Insofar as the trial judge is concerned, it is his duty to follow and apply the existing law, it being the prerogative of the Supreme Court to ascertain if and when the precedent has outlived its usefulness. Kersten Company, Inc. vs. Department of Social Services, 207 NW 2d 117, 121-122. It appears, therefore, that the particulars of the bill of particulars are inadequate to support the offenses charged in the several indictments, and the indictments must be set aside.

Lastly, this judge feels obliged to commend counsel for the State and defendants. They have presented meritorious issues. They have been well prepared and professional at all times. They have been abundantly conscientious to the service of their clients during the proceedings in this district court.

IT IS ORDERED:

The indictments, as amended, in Story County Criminal Cause Nos. 4904 through 4933, inclusive, should be and they are set aside.

Dated at Nevada, Iowa, this 11th day of October, 1976.

/s/ George G. Fagg
Judge, 2nd Judicial District of Iowa.

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APPENDIX D

713.1 False pretenses

If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property, or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be imprisoned in the penitentiary not more than seven years, or be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding one year, or be punished by both such fine and imprisonment.

719.1 "Conspiracy" defined—common law

If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property, or rights in property of another, or to do any illegal act injurious to the public trade, health, morals, or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be imprisoned in the penitentiary not more than three years.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or

rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the instrument to which this certification is attached were mailed to the following named counsel this _____ day of July, 1977:

Richard C. Turner
Attorney General of Iowa
and
Gary H. Swanson
Assistant Attorney General
State Capitol Building
Des Moines, Iowa 50319
Attorneys for State of Iowa

with postage thereon fully prepaid.

James P. Linn

Supreme Court, U. S.
FILED
JUL 28 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 77-72

FRANK R. WEST,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Iowa Supreme Court (App. A, Petition) is reported at 252 N. W. 2d 457 (Iowa 1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a holding by the Iowa Supreme Court that the actions of Petitioner Frank R. West as set forth in his indictment could violate § 713.1, Code of Iowa, 1975, is an unforeseeable expansion of that statute prohibited by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Iowa false pretenses statute, § 713.1, Code of Iowa, 1975, the Iowa conspiracy statute, § 719.1, Code of Iowa, 1975, and the Fourteenth Amendment to the United States Constitution are set forth as Appendix D of the Petition.

STATEMENT OF THE CASE

Petitioner was indicted with Robert E. Lee on thirty charges of conspiracy to violate § 713.1, Code of Iowa, 1975, in violation of § 719.1, Code of Iowa, 1975, and of violating § 713.1, Code of Iowa, 1975. The factual basis for the indictments is set out in the opinion of the Iowa Supreme Court (App. A, Petition).

Prior to the trial date, the trial court set aside the indictments on the ground that the minutes of testimony

attached to the indictments along with the bill of particulars that had been filed did not show any false statement alleged to have been made was of a past or existing fact as required under § 713.1, Code of Iowa, 1975, but instead were statements of a promise to pay in the future the false making of which did not violate § 713.1, Code of Iowa, 1975 (App. C, Petition).

On appeal the Iowa Supreme Court reversed the trial court, holding that a promise to perform an act in the future made with no intent to perform constitutes a misrepresentation within the meaning of § 713.1, Code of Iowa, 1975, and ordered the case remanded for trial (App. A, Petition).

From that judgment and the denial of their Petition for rehearing (App. B, Petition) Petitioner petitions this Court for a Writ of Certiorari to the Iowa Supreme Court.

ARGUMENT

The Iowa Supreme Court did not expand the scope of § 713.1, Code of Iowa, 1975. Petitioner points out four quotes from the Iowa opinion in his statement of the case which he claims show that the acts committed by him were not considered a crime under § 713.1, Code of Iowa, 1975, at that time.

A superficial reading of these quotes alone would seem to indicate that the Iowa Supreme Court has expanded the meaning of § 713.1 to make previously legal

conduct now illegal. This is not the case however, as a careful reading of the entire opinion reveals.

Petitioner relies heavily on *Bouie v. City of Columbia,* 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 894 (1964), for support of this proposition.

The fact situation in *Bouie* is different from the case at hand, that statute being very narrow in its scope and very precisely worded. This Court held in *Bouie*:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."

The holding in *Bouie* was predicated on this narrow and precise statute as this Court points out in *Marks v. United States,* — U. S. —, 51 L. Ed. 2d 260, 975 S. Ct. — (1977), when it stated:

> "The statutory language there was 'narrow and precise' 378 U. S. at 352, 84 S. Ct. at 1701, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning."

Section 713.1, Code of Iowa, 1975, in contrast to the statute involved in *Bouie* is broad and, as the case law cited in the Iowa Supreme Court's opinion shows, was intended to cover a variety of illegal actions.

The answer to the question presented in this case is found in *Rose v. Locke,* 423 U. S. 48, 46 L. Ed. 2d 185, 96 S. Ct. 243 (1975). A Tennessee statute forbid "crimes against nature" and the Defendant was convicted thereunder for committing the act of cunnilingus. The Defendant argued first, that the Tennessee Supreme Court had never before passed upon whether the commission of that particular act was a violation of the statute and thus, had no fair warning and second, the statute itself was unconstitutionally vague. As Petitioner points out in his Petition at page 6, this Court held that with respect to the vagueness argument "the Due Process Clause requires that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden" 423 U. S. at 50, 46 L. Ed. 2d at 188.

Respondent does not understand Petitioner to be challenging § 713.1, Code of Iowa, 1975, on the second ground urged in *Rose* that it is unconstitutionally vague and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to give a person sufficient warning of what conduct is expected of him.

It is the reasoning on the first ground set out in *Rose* that is important to this case.

The Sixth Circuit Court of Appeals sustained the Defendant's challenge in *Rose* in part because it was unable to find any previous opinions by the Tennessee Supreme Court applying the statute to the act of cunnilingus and thus concluded that the statute failed to give fair warning.

This Court reversed after looking at the statutory authority in Tennessee and concluding that:

> ". . . The Tennessee Supreme Court had given sufficiently clear notice that § 39-707 would receive the broader of two plausible interpretations, and would be applied to acts such as those committed here when

such a case arose." 423 U. S. at 52, 46 L. Ed. 2d at 190.

In the case at hand the Iowa Supreme Court cites numerous Iowa cases in support of its decision where future promises and actions coupled with a present inability or intention not to perform were held to be violations of § 713.1, Code of Iowa. Indeed, the Court cites *State v. Huckins,* 212 Iowa 283, 234 N. W. 554, 559 (1931), where it said:

> "One's intention or knowledge is a fact as to which he may make a false pretense and thereby (the other elements being present) perpetrate the crime of cheating by false pretenses."

as support for the proposition that its holding is not an enlargement of the statute.

In further support of its proposition the Court cited *State v. Foxton,* 116 Iowa 81, 147 N. W. 347 (1914), wherein:

> "This court found that the presentation of a personal check implied that Defendant had the ability to pay, sustaining a false pretenses charge."

The Court went on to state in its opinion in this case:

> "We are unable to perceive difference between a finding that the false pretenses may be premised on a false promise and a finding that Defendant misrepresented an ability to pay. When a Defendant, knowing he is insolvent, promises to pay, he falsely represents his intention to pay."

The Court further stated:

> "The Iowa cases addressing this last issue are all marked by two characteristics which minimize their value as legal precedent, namely, (1) that the cases

> failed to base the results on the issue discussed here, and (2) that the cases, all of early vintage, fail to recognize the tenor of present day commercial enterprise. None of the cases hold a charge or conviction of false pretenses invalid because of a failure to allege or prove a misrepresentation of past or existing fact, although the premise appears in the text of the opinions."

Justice McCormick in his concurring opinion obviously feels the Court's holding has always been the law in Iowa by pointing out that:

> "This case comes well within the principle that a false promise may be coupled with a false representation of fact to constitute a false pretense. (Citations)."

This Court held in *Bouie v. Columbia, supra,* at 12 L. Ed. 930, 378 U. S. 354, that:

> "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the indefensible by reference to the law which had been expressed prior to the conduct in issue' it must not be given retroactive effect."

It is clear that the Iowa Supreme Court did not expand § 713.1, Code of Iowa, 1975, to include a new act not previously thought to be criminal under a vague statute, as was raised in *Rose v. Locke, supra,* nor did it take a narrow and precise statute and expand it to conduct clearly outside its scope as in *Bouie v. Columbia, supra;* instead it merely held specifically that a promise to perform an act in the future made with no intent to perform is a violation of § 713.1, Code of Iowa, a position which was entirely consistent with its previous holdings as set out in its opinion which holdings would give Petitioner clear notice that his conduct would be held to be illegal under § 713.1, Code of Iowa.

CONCLUSION

For the foregoing reason it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney General of Iowa

GARY H. SWANSON
Assistant Attorney General

JOHN R. PERKINS
Assistant Attorney General

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, John R. Perkins, Assistant Attorney General for the State of Iowa, hereby certify that on the 25th day of July, 1977, I mailed three (3) copies of Brief for Respondent in Opposition, correct 1st class postage prepaid to:

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I further certify that all parties required to be served have been served.

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